IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-810

DANIEL A. DELP, JR.,

Petitioner,

v.

STATE OF OHIO,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

[redacted]

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BRIEF FOR PETITIONER

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Ohio in the case of *State of Ohio v. Daniel A. Delp., Jr.*, entered on the 15th day of November, 1974. That judgment dismissed an appeal from the judgment of the Court of Appeals, Seventh Judicial District of Ohio, entered on the 26th day of June, 1974, affirming a judgment against Petitioner.

OPINIONS BELOW

The opinion of the Court of Appeals, Seventh Judicial District of Ohio, has not been reported. It is printed as Appendix B hereto. The Supreme Court of Ohio dismissed Petitioner's appeal without opinion (Appendix C).

JURISDICTION

The Supreme Court of Ohio denied Petitioner's motion for hearing on the 15th day of November, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. Whether Ohio's statutory scheme of classifying drugs is unreasonable in its classification, discriminatory in penalties and grants the prosecution unfettered discretion to obtain different penalties for similar offenses, thus posing serious and timely constitutional questions which must be resolved.

2. Whether given the present scientific and sociological knowledge concerning the effects of hallucinogens and cocaine upon society the punishment dictated by statute of imprisonment for ten to twenty years for the possession for sale of small amounts of these drugs is unconstitutionally excessive and violates the prohibitions of the Eighth Amendment to the Constitution of

the United States and Article I, Section 9 of the Constitution of the State of Ohio against cruel and unusual punishments, and an evidentiary hearing to allow the opportunity to establish the facts necessary to support this proposition must be granted.

3. Whether a search warrant based upon facts that furnish no reliable information which might lead one to believe that at the time of its execution there was criminal activity afoot in the dwelling or other place to be searched nor sufficient information to show that the informant was credible or his information reliable is insufficient in the matter of probable cause and the fruits of a resulting search must be suppressed.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the United States Constitution provides in part:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, nor deny to any person within its jurisdiction the equal protection of the laws.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

STATUTORY PROVISIONS INVOLVED

(See Appendix A)

STATEMENT OF THE CASE

On February 27, 1973, Petitioner, Daniel A. Delp, Jr., was found guilty of unlawful possession for sale of a narcotic (cocaine), in violation of Ohio Revised Code Section 3719.20(A), and unlawful possession for sale of an hallucinogen (phencycledene, hereinafter referred to as P.C.P, and marijuana and L.S.D.), in violation of Ohio Revised Code Section 3719.44(B). Petitioner was tried before a jury, which returned verdicts of guilty on the two counts, and then sentenced to ten to twenty years in the Ohio State Penitentiary on both counts with the two terms of incarceration to be served concurrently. The Court of Appeals for the Seventh Judicial District of Ohio, on June 26, 1974, affirmed the decision of the trial court as to the first count, but

stated that although P.C.P. should have been stricken from the second count the failure to do so was harmless error. The Court of Appeals, however, struck down the second count and modified the judgment to imprisonment in the Ohio State Penitentiary for a term of two to fifteen years for violation of Ohio Revised Code Section 3719.09, possession of a narcotic drug. The Supreme Court of Ohio, on November 15, 1974, dismissed Petitioner's appeal on the ground that it raised no substantial constitutional question and Petitioner now presents this Court with his timely Petition.

The pertinent facts of Petitioner's case are as follows. On November 3, 1972, Judge J. Warren Bettis of the Columbiana County, Ohio, Court of Common Pleas was presented, in the early morning hours, with an affidavit for the purpose of obtaining a search warrant to search the premises of Petitioner, Daniel A. Delp, Jr. The supporting facts contained in the affidavit were that "Dawn Gregory of Salem has personal knowledge of the fact that narcotics and other dangerous drugs are in the Daniel Delp residence, and she having been a reliable informant before . . . . " A search warrant was issued and the subsequent search of the Delp residence produced small quantities of four drugs, alleged to be marijuana, L.S.D., P.C.P. and cocaine. Mr. Delp was charged with possession of these drugs at the time of his arrest. Approximately a fortnight later, Mr. Delp was secretly indicted on two counts of possession for sale of the drugs, pursuant to Sections 3719.44(B) and 3719.20(A) of the Ohio Revised Code.

On February 2, 1973, a hearing was had on various motions filed by counsel for Mr. Delp, and further

hearing was had on these matters on February 8, 1973. At these hearings, several new facts with respect to the issuance of the search warrant were raised. In particular, the court was presented with a typewritten transcription of oral testimony taken under oath by Judge Bettis on the morning of November 3, 1972. The testimony was given by Lt. Bradley of the Salem, Ohio Police Department and Dawn Gregory, the informant who had provided information upon which the issuance of the search warrant was based. The testimony revealed the following facts:

1. That at some unspecified time in the past Dawn Gregory had observed drugs in Petitioner's apartment;
2. That two days prior to the issuance of the warrant, Dawn Gregory had taken some drugs given her by a person named Randy Guy;
3. That Randy Guy told Dawn Gregory that he got the drugs from "Julie" at "the house."

At the conclusion of the February 8th hearing on motions all of defense counsels' motions, including a motion to suppress evidence, were overruled save for one part of a motion for bill of particulars concerned with the nature of the drug P.C.P.

On February 22, 1973, a trial was had on both counts as charged in the indictment. The only evidence introduced at the trial with respect to the intent to sell drugs was the testimony of the informant, Dawn Gregory. Miss Gregory testified that she had obtained a few pills of unknown makeup on two occasions over a month prior to the arrest of Mr. Delp, and that she had observed Mr. Delp sell a small quantity of marijuana to a third person several weeks before the arrest. Miss

Gregory testified that during the entire period covered by her testimony she was "high" on drugs at least once a day. Due to this fact her entire testimony was filled with inconsistencies and inaccurate accounts. At the close of the State's case counsel for the defense moved to strike the drug P.C.P. from count one of the indictment since it was not an hallucinogen and its inclusion was highly prejudicial due to the quantity involved in relation to the other drugs. The court overruled this motion and upon the conclusion of the trial the jury returned verdicts of guilty on both counts.

The verdicts of the jury were modified by the Court of Appeals for the Seventh Judicial District of Ohio as noted above and on November 15, 1974, the Supreme Court of Ohio dismissed Petitioner's appeal without opinion. That court ruled that no substantial constitutional question was raised and from that decision Petitioner appeals to this Court for a Writ of Certiorari to the Supreme Court of Ohio.

REASONS FOR GRANTING THE WRIT

I.

OHIO'S STATUTORY SCHEME OF CLASSIFYING DRUGS IS UNREASONABLE IN ITS CLASSIFICATION, DISCRIMINATORY IN PENALTIES AND GRANTS THE PROSECUTION UNFETTERED DISCRETION TO OBTAIN DIFFERENT PENALTIES FOR SIMILAR OFFENSES, THUS POSING SERIOUS AND TIMELY CONSTITUTIONAL QUESTIONS WHICH MUST BE RESOLVED.

A. The Denial of Due Process

In Ohio, the definitional statute governing hallucinogens, Section 3719.40 of the Ohio Revised Code, states in part.

> "[H]allucinogen" means lysergic acid diethylamide, commonly known as LSD, N-N-dimethyltryptamine, commonly known as DMT, cannabis, commonly known as marijuana, hashish, ganja, or bhang, psilocybin, mescaline, peyote, bufotenin, epena, parica, ayahuasca, yage, caapi, amanita, muscaria, and any other compound, mixture, preparation, or substance which produces hallucinations or illusions when introduced into the body. . . .

The last phrase of this particular paragraph, "substance[s] which produce . . . hallucinations or illusions when introduced into the body," was the basis for inclusion of P.C.P. in count one of the indictment, because P.C.P. is not specifically enumerated anywhere in the definitional statute. Since P.C.P. is not specifically detailed in the statute it must be narrowly construed on behalf of Petitioner. This being so, the State has the obligation to prove beyond a reasonable doubt that P.C.P. *does* "produce hallucinations or illusions when introduced into the body." *In re Baker*, 18 Ohio App.2d 276, 248 N.E.2d 620, 624 (1969).

The statute, when read in light of the existing case law, appears at first brush to be an adequate safeguard of Petitioner's due process rights. But, as is so often the case, when one scratches beneath the surface what appears to be and what actually is are two different things. In the instant case, P.C.P. was included under the catch-all phrasing of Section 3719.40 of the Revised

Code. Notwithstanding the fact that in the bill of particulars submitted by the State prior to trial P.C.P. was stated to be an analgesic (aspirin is an analgesic), the drug was still included as an hallucinogen in the indictment. Apparently, as long as the drug in question is not specifically set forth under the various sections in Chapter 3719 of the Ohio Revised Code it can be placed under the section covering hallucinogens. (Chapter 3719 of the Revised Code of Ohio includes: Section 3719.01, Narcotic Drugs; Section 3719.23, Barbiturates and Amphetamines; and Section 3719.40, Hallucinogens). This possibility oft-times turns into reality when the State has a weak case as to known drugs and tries to escalate the crime into more than mere possession by the inclusion of an unknown drug.

In the case at bar Petitioner was found guilty under count one of the indictment for the possession for sale of the drugs known as L.S.D., marijuana and P.C.P. Petitioner made several unsuccessful attempts both prior to and during trial to strike P.C.P. from the indictment on the basis that P.C.P. was not included as an hallucinogen under the definitional statute of the Revised Code, an error that would have a prejudicial effect upon the jury. It is the contention of Petitioner that without a pretrial finding that an unknown drug could be proven to be an hallucinogen, to include such an unknown drug with other drugs defined by statute as hallucinogens would be, and is, prejudicial error.

The Court of Appeals found that it was never proven that P.C.P. was, in fact, prohibited by the statute under which Petitioner was convicted. It was further noted by the Court of Appeals that the trial court was requested to alleviate the effects of the references to P.C.P. by

way of a motion to strike the term P.C.P. at the close of the State's case and the trial court should have sustained this request. But it was held that the effects of the references to P.C.P. were not prejudicial and constituted harmless error. Petitioner respectfully contends, however, that the law with respect to prejudicial error, applied to the facts of the present case, leads to the inescapable conclusion that the conviction must be reversed because it was obtained in violation of Petitioner's right to due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution.

This Court, in formulating the harmless error rule, stated: "The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." *Fahey v. Connecticut*, 375 U.S. 85, at 86, 87 (1963). In further clarifying its position, this Court stated that "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Chapman v. California*, 386 U.S. 18, at 24 (1967). In the present case the drug P.C.P. was so inextricably entwined in the State's case that when the Appellate Court found that the State had not presented any probative evidence for the jury to ponder, to then deny Petitioner's motion to strike was fatal to count one of the indictment.

The State, in its case-in-chief, supported the inclusion of P.C.P. in count one of the indictment in order to prove the requisite intent to sell as so charged. The State presented the jury with the following evidence as fruits of the search of Petitioner's home: two or three tablets of L.S.D.; just over two ounces of marijuana; a

minute quantity of cocaine; a vial full of P.C.P. tablets. The quantity of P.C.P. was needed to show the intent to sell as to count one of the indictment. The presentation worked so well that the jury also convicted Petitioner of possession for sale of a very small quantity of cocaine, a narcotic. Even the Court of Appeals reversed that finding, stating that "we find no evidence to indicate that at the time Appellant possessed the cocaine, he did so for the purpose and with the intent to sell it." *See*, Appendix B, at 16b. Notwithstanding the fact that the Appellate Court found "no evidence" as to possession for sale of a narcotic, and "no probative evidence" that P.C.P. was an hallucinogen, the jury found Petitioner guilty on both these issues.

In closing argument, the vial of P.C.P. tablets was placed on the jury box by the State and consistently and vigorously referred to throughout the argument. It was the clear intent of the State to induce the jury to consider this evidence to support a verdict of guilty. The jury responded and the result can be nothing less than harmful and prejudicial error.

Given the questionable nature of all the evidence presented in this case, a statement of this Court in the *Chapman* case directly applies:

> In fashioning a harmless constitutional error rule, we must recognize that harmless error rules can work very unfair and mischievous results when, for example, highly important and persuasive evidence, or argument, though legally forbidden, finds its way into a trial in which the question of guilt or innocence is a close one. 386 U.S. at 22.

B. The Statutory Classification

In the present case, timely motions on behalf of Petitioner were filed in the trial court contending that the classification of marijuana as an hallucinogen and the classification of cocaine as a narcotic drug are unconstitutional on the premise that the factual scientific and medical information with respect to these drugs does not support the classifications as set forth in their respective sections of the Ohio Revised Code. The result of the erroneous classifications is to subject Petitioner to a discriminatory penalty in violation of the constitutional guarantee of equal protection under the laws. In order to produce the complicated and extensive factual basis to support the contention an evidentiary hearing was requested. The trial judge overruled this motion and the request for a hearing, stating: "I feel that I'm going to rely on the legislative classification. . . . This is a complex problem, and isn't going to be solved in any common pleas court." (R-101). The Court of Appeals found that the trial court had provided an opportunity for factual hearing, citing R-45. This is an error in the transcription. Both the State and the trial judge realize and will support the fact that the request for an evidentiary hearing was denied on these motions. The case should therefore be remanded in order to provide this opportunity.

It is beyond question that this Court has the power to review on the basis of legislative classification. *See, e.g., Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Brown v. Board of Education*, 370 U.S. 660 (1962); *McLaughlin v. Florida*, 379 U.S. 184 (1964); and *Leary v. United States*, 395 U.S. 6 (1969). Recently three

State Supreme Courts adopted this approach of reviewing the legislative classification although basing their decisions on recognized outside evidence and scholarship generally available to the public. *See, State v. Zornes*, 469 P.2d 552 (Wash. 1970); *McCabe v. Illinois*, 275 N.E.2d 407 (Ill. 1972); and *People v. Sinclair*, 194 N.W.2d 878 (Mich. 1972).

Although Petitioner agrees with this position it should be pointed out that since these cases have been decided a new approach has been taken in the Federal system as it relates to a constitutional attack on a legislative classification. In *English v. Miller*, 341 F.Supp. 714 (1972), the Federal courts struck down the classification of marijuana as a narcotic on the basis of overwhelming scientific evidence available to the public generally. The court, citing *Brown v. Board of Education, supra*, took judicial notice of the available scientific knowledge on the issue. *English v. Miller, supra*, at 718, fn. 4. On appeal the reviewing court overturned the lower court's ruling stating that to find a legislative classification unconstitutional, the court should have held an evidentiary hearing so that the scientific evidence could be tested by the time-proven art of cross-examination. *English v. Miller*, 481 F.2d 188 ( ).

The trial court denied Petitioner an opportunity to present evidence and failed to take judicial notice of the scientific evidence available. Petitioner contends that this constituted error and the case should, therefore, be remanded.

C. Discriminatory Penalties Due to Classification

As shown above, courts have found that scientific evidence overwhelmingly establishes that statutes similar to those in question here arbitrarily classify marijuana in the same category as dangerous drugs (the same argument is also applicable to cocaine). The result of this arbitrary classification is to subject Petitioner to a discriminatory penalty in violation of the equal protection and due process clauses of the Fourteenth Amendment to the United States Constitution.

Petitioner was sentenced to ten to twenty years imprisonment for possession for sale of an hallucinogen and for possession for sale of a narcotic. He was sentenced to serve the two terms of incarceration concurrently, each carrying the same penalty. These sentences were automatically triggered by the Ohio statute which sets forth the same mandatory penalties for all drugs classified in the narcotic and hallucinogen category: Ohio Revised Code Section 3719.99(D). Thus, by the operation of the mandatory sentences attendent upon all drugs in these categories, Petitioner was subjected to the same harsh penalties that are imposed upon heroin and opium offenses.

In contrast to Petitioner's sentences the penalties within the same chapter for possession of amphetamines and barbiturates may be a mere fine of no more than $1,000 and even if imprisonment is imposed the sentence is only one year. *See*, Ohio Revised Code Section 3719.99(I), possession of amphetamines or barbiturates, a misdemeanor. This is based on the fact that there is no distinction made between possession and possession for sale of amphetamines or barbiturates, while possession for sale of marijuana or cocaine carries

a sentence which is twenty-fold that of the former drugs. Had Petitioner committed the very same acts but with either amphetamines or barbiturates instead of marijuana or cocaine, rather than facing incarceration for ten to twenty years with eligibility for parole in approximately six years he would have, at most, been charged with a misdemeanor. (The crime of possession for sale is unique to the sections of the Revised Code concerning hallucinogens and narcotics. *See*, Ohio Revised Code Section 3719.24).

The same statute, as amended and in effect as Petitioner's trial began, prohibits the sale without a license of hallucinogens, including marijuana. *See*, Ohio Revised Code Section 3719.42. The penalty for violating this provision of Ohio law is a fine of not more than $10,000 and imprisonment of two to fifteen years. *See*, Ohio Revised Code Section 3719.99(C). So, persons who commit the very same act as Petitioner of selling marijuana or who sell more dangerous hallucinogens may be prosecuted under this section of the statute and receive a substantially shorter sentence.

Another Ohio statute also makes it a crime to sell or possess "dangerous drugs," including marijuana. Ohio Revised Code Section 4729.51(C). In stark contradistinction to Petitioner's sentence, the penalty set forth in this other statute for a first offense of possessing or selling dangerous drugs is merely a fine of not more than $1,000, imprisonment of not more than one year or both. Ohio Revised Code Section 4729.99(F). Under this statute, a person who commits the very same act as did Petitioner may be fined and not imprisoned at all or, at the most, may be imprisoned for a term many times shorter than that sentence imposed upon Petitioner.

Furthermore, under Ohio Revised Code Section 3719.32 Petitioner, for possessing an unlimited quantity of Cannabis Indica (which according to the State's expert produced at trial is the exact same substance as Cannabis Sativa L, that substance for which Petitioner was convicted), can *only* be fined $50. Ohio Revised Code Section 3719.99(M).

The penalties imposed upon Petitioner violate the equal protection clause in at least three respects. First, they are much more severe than the penalties for the very same act in the same statute and in another statute. Second, they are much more severe than the penalties for selling or possessing drugs, such as amphetamines and barbiturates, that are much more dangerous than marijuana. And third, they are equally severe as the penalties for selling or possessing for sale narcotic drugs, such as heroin and opium, that are much more dangerous than marijuana or cocaine.

The discriminatory severity of Petitioner's penalty stands in flagrant contradiction to this Court's decisions in *Skinner v. Oklahoma*, 316 U.S. 535 (1942), and *McLaughlin v. Florida*, 379 U.S. 184 (1964). In *Skinner*, the Court held that it violated the equal protection clause for a State to sterilize multiple offenders but to exempt offenses arising out of the prohibition laws, the revenue acts, embezzlement or political offenses. And in *McLaughlin* the Court, relying on *Skinner*, held that it violated the equal protection clause for a State to make cohabitation between unmarried persons a crime if they were of different races but not if they were of the same race. The Court's decision in both cases was based upon the principle that it is "invidious discrimination" when the

State "lays an unequal hand on those who have committed intrinsically the same quality of offense. . . . " 316 U.S. at 541, 379 U.S. at 194. By this standard the sentence of Petitioner is doubly discriminatory; it is excessively more severe than the penalty under the same statute and under another statute for the very same offense and it is excessively more severe than the penalty under the same statute for offenses (sale or possession of amphetamines or barbiturates) that are intrinsically more dangerous than Petitioner's offense. This is exactly the kind of discriminatory punishment that was held to be unconstitutional in both *Skinner* and *McLaughlin.*

A discriminatory penalty such as Petitioner's that disproportionately inflicts an exceedingly harsh punishment hardly complies with the policy of the equal protection clause "as reflected in congressional enactments dating to 1870 . . . to subject all persons 'to *like* punishment, pains, penalties, taxes, licenses, and exactions of every kind, *and to no other.*' R.S. §1977, 42 U.S.C. §1981 (1958 ed.)." *McLaughlin, supra*, at 192 (emphasis added).

Admittedly, the present case does not concern itself with the penalty of sterilization, as did *Skinner*, or a classification based on race, as did *McLaughlin*. However, those distinctions only concern whether, in judging the State's attempt to justify its discrimination, the courts should apply the "reasonable State interest" standard or the stricter "compelling State interest" standard. It is submitted that the right to be free from discriminatory imprisonment, especially for so long a period as ten to twenty years, is a fundamental liberty

that, like the right to be free from discriminatory sterilization, should be judged by the "compelling State interest" standard. But even if this view is rejected it cannot be overly emphasized that there is no State interest, compelling or reasonable, that can justify the discriminatory punishment inflicted upon Petitioner. Speaking to this very point in his concurring opinion in the *Sinclair* case, Justice Williams of the Michigan Supreme Court said: "Under either of the above standards the classification of marijuana as a 'hard drug' . . . constitutes a violation of the Equal Protection Clause. . . . " 194 N.W.2d at 894. The penalty inflicted upon Petitioner is clearly discriminatory and cannot be justified under any standard.

D. The Prosecutor's Unfettered Discretion

To permit a prosecutor the unfettered discretion to pick and choose among various statutes covering the same act and having extreme variance in their penal provisions denies equal protection of the laws to the individuals involved and can only cause disrespect for the law and add to the widespread view among the people of America that our laws are hypocritical and do not provide justice.

This Court's decision in *Skinner v. Oklahoma*, 316 U.S. 535 (1942), was based on the principle that it is "invidious discrimination" when the State "lays an unequal hand on those who have committed intrinsically the same quality of offense. . . . " 316 U.S. at 541. Following the rationale in *Skinner* the Supreme Court of Washington, in the case of *State v. Zornes*, 469 P.2d

552 (1970), concluded that a statutory scheme which gives the prosecutor the discretion to charge for either a felony or a misdemeanor for the same act committed under the same circumstances denied the person charged with the felony the equal protection of the laws. 469 P.2d at 563. As the court stated in *Zornes* at 562:

> There is no logical basis for drawing a distinction between an authorization contained in one statute, to charge for either a misdemeanor or a felony, and the same authorization contained in different statutes, if the prosecution under either statute is for the identical act.

In the instant case, according to the State's only expert witness at trial, Cannabis Sativa L. and Cannabis Indica are the same. However, under Ohio Revised Code Section 3719.32 Petitioner could have only been fined $50, a penalty considerably less severe than serving ten to twenty years in the Ohio State Penitentiary.

In the present case the prosecution states, and the Court of Appeals affirms, that the prosecution had, on the basis of the acts that have resulted in the conviction of Petitioner, the unfettered discretion to charge Petitioner under a variety of different statutes including Ohio Revised Code Sections 3719.32, 3719.43, 3719.42, 4729.28 and, with respect to count two of the indictment, 4729.28. *See* Appendix B, at 12b. The penalties provided by the different statutes range from a moderate fine to lengthy imprisonment. Petitioner was charged under the statutes that provide for the most serious penalty, ten to twenty years imprisonment.

That others committing the same offense can be charged under laws with minor penalties and that there are no guidelines established to govern the use of the different laws require that the conviction under the statute used in this case be reversed because Petitioner has been denied equal protection of the laws.

To assume arguendo that because some of the lesser statutes include additional elements there exists a rational basis for the different penalties is not an argument that can be raised against Petitioner here, and in fact this contention will buttress Petitioner's point that his excessive penalty is impermissible. The fact that the State has less of a burden in proving the elements necessary for conviction under the statute chosen for the present case only underscores the fact that the heavy penalty is inconsistent with the aforementioned constitutional guarantees. The fact remains that for the commission of identical acts under the same circumstances the choice of penalties is subject only to the personal feelings of the prosecutor. The situation described above is in direct contravention of the mandate given by this Court in the *Skinner* and *McLaughlin* cases.

II.

GIVEN THE PRESENT SCIENTIFIC AND SOCIOLOGICAL KNOWLEDGE CONCERNING THE EFFECTS OF HALLUCINOGENS AND COCAINE UPON SOCIETY THE PUNISHMENT DICTATED BY STATUTE OF IMPRISONMENT FOR TEN TO TWENTY YEARS FOR THE POSSESSION FOR SALE OF SMALL AMOUNTS OF THESE DRUGS IS UNCONSTITUTIONALLY EXCESSIVE AND VIOLATES THE PROHIBITIONS OF THE EIGHTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES AND ARTICLE I, SECTION 9 OF THE CONSTITUTION OF THE STATE OF OHIO AGAINST CRUEL AND UNUSUAL PUNISHMENTS, AND AN EVIDENTIARY HEARING TO ALLOW THE OPPORTUNITY TO ESTABLISH THE FACTS NECESSARY TO SUPPORT THIS PROPOSITION MUST BE GRANTED.

The statutes complained of here, requiring a minimum sentence of ten years for the possession for sale of small amounts of drugs, are morally and practically excessive. This fact is recognized by every other State in the Union, as the highest minimum penalty outside the State of Ohio for a first offense is five years. It is a fact recognized by the National Commission on Marijuana and Drug Abuse which recommends *maximum* penalties of five years for each offense (Report of the National Commission on Marijuana and Drug Abuse, at 151) and it is an inescapable conclusion based upon the case law surrounding cruel and unusual punishments. Yet the State of Ohio continues to subject its citizens to these

punishments. This can no longer be acceptable under the rule of constitutional law. The punishments in question must be declared unconstitutional or many people in the State of Ohio will continue to receive these cruelly excessive punishments.

The penalties in this case clearly violate the Eighth Amendment's prohibition against cruel and unusual punishments, the same prohibition found in Article I, Section 9 of the Constitution of the State of Ohio. Prior to the imposition of the sentences Petitioner moved to have these penalties declared cruel and unusual and Petitioner also requested an evidentiary hearing to show that the penalties involved were greatly excessive in relation to the seriousness of the offense for which he was convicted. Both requests were overruled by the trial court.

Given the present medical and scientific knowledge concerning the drugs involved (extensive evidence of this knowledge would have been introduced at the requested evidentiary hearing), the contemporary attitude of American society toward the drug and the fact that no other State requires such excessive penalties for the same offense, it is impossible to come to any conclusion other than that the penalties complained of in this case are unconstitutionally excessive and must be struck down as a violation of the Eighth Amendment.

The nature and scope of the prohibition against cruel and unusual punishments is not easily ascertained. There is the inherent difficulty that "the cruel and unusual punishments clause, like other great clauses of the Constitution, is not susceptible of precise definition." *Furman v. Georgia*, 408 U.S. 238, 258 (1972, Brennan, J., concurring). In fact, "of all our funda-

mental guarantees, the ban on 'cruel and unusual punishments' is one of the most difficult to translate into judicially manageable terms." 408 U.S. at 376 (Burger, C.J., dissenting). There is also the further problem that there has been a paucity of case law regarding the Eighth Amendment and this has prevented a precise definition which might have been developed. The Supreme Court "has had little occasion to give precise content to the Eighth Amendment, and in an enlightened democracy such as ours this is not surprising." *Trop v. Dulles*, 356 U.S. 86, 100 (1958). Nevertheless, since the landmark case of *Weems v. United States*, 217 U.S. 349 (1910), the standards that have been developed leave no doubt that the punishment imposed in the case at bar falls well within the ban of the Eighth Amendment.

The standards set forth for the interpretation of what constitutes cruel and unusual punishment have been clearly set forth by this Court in the case of *Furman v. Georgia, supra*. Because this development in the law occured after the Ohio Supreme Court last ruled on this question in the case of *State v. Chaffin*, 30 Ohio St.2d 13, 282 N.E.2d 46 (1972), it is contended that holdings in the State of Ohio which rely upon *Chaffin*, as does the present case (*see*, Appendix B, at 15b), do not fully comply with the requirements laid down in the *Furman* decision and must therefore be reconsidered in light of the mandates of the Supreme Court of the United States in the later case.

III.

A SEARCH WARRANT BASED UPON FACTS THAT FURNISH NO RELIABLE INFORMATION WHICH MIGHT LEAD ONE TO BELIEVE THAT AT THE TIME OF ITS EXECUTION THERE WAS CRIMINAL ACTIVITY AFOOT IN THE DWELLING OR OTHER PLACE TO BE SEARCHED NOR SUFFICIENT INFORMATION TO SHOW THAT THE INFORMANT WAS CREDIBLE OR HIS INFORMATION RELIABLE IS INSUFFICIENT IN THE MATTER OF PROBABLE CAUSE AND THE FRUITS OF A RESULTING SEARCH MUST BE SUPPRESSED.

The standards established by this Court with respect to the sufficiency of a search warrant in the matter of probable cause have not been met or followed by the State of Ohio in the present case. The failure of the State to apply these sound and time-tested standards in effect undermines the protections afforded to the citizens of Ohio by the Fourth Amendment to the United States Constitution. The facts of this case are a manifestation of a lax attitude on the part of both police officials and the courts in the State of Ohio in the application of the Fourth Amendment. The erosion of constitutional guarantees is one of the most serious threats a free society can experience and for that reason this Court should hear the question presented in this argument.

An affidavit was presented to a judge which contained the bald allegation that "one Dawn Gregory had personal knowledge that drugs were present" in the home of Petitioner. At the hearing on a motion to

suppress evidence the prosecutor took, from the hands of one of Petitioner's counsel at trial, a typewritten page of transcript under consideration as oral testimony taken at the time the search warrant was issued and ripped a portion of the transcript from the page. The prosecutor then went on to declare that the tape from which the testimony was prepared had been destroyed. The judge who had issued the warrant was present in the courtroom at the time and stated that he had just listened to the tape and the tape corresponded with the transcription. The judge further testified that he could not recollect the testimony independently of the tape. Over objection, the testimony was admitted and considered. Petitioner contends that this testimony should not be considered by this Court for the purpose of bolstering the search warrant. Even if considered, however, the search warrant itself does not meet the constitutional requirements necessary to invade the privacy of an individual's home. The facts which were presented in the additional testimony are:

1. That at some unspecified time in the past Dawn Gregory had observed drugs in Petitioner's apartment;
2. That two days prior to the issuance of the warrant, Dawn Gregory had taken some drugs given her by a person named Randy Guy;
3. That Randy Guy told Dawn Gregory that he got the drugs from "Julie" at "the house."

The single other fact important to this argument is that the reliability of the informant was never sufficiently established either in the affidavit or in the additional oral testimony. The only information ever used to establish the reliability of the informant was

the statement: "She having been a reliable informant before. . . ." The law surrounding the issuance of a search warrant leaves no doubt that the present warrant fails to meet the constitutional standards necessary to its validity.

A search warrant must be based on probable cause that a crime is being committed. Fourth Amendment, United States Constitution; Article I, Section 14, Constitution of the State of Ohio. Furthermore, Fourth Amendment standards for determining the validity or sufficiency of a search have been incorporated in the Fourteenth Amendment to the United States Constitution and made applicable to the several States. *Mapp v. Ohio*, 367 U.S. 643 (1961).

It is also a well-settled principle that an illegal search cannot be justified by its success. *See, Johnson v. United States*, 333 U.S. 10 (1947), and *McDonald v. United States*, 335 U.S. 451 (1948).

Applying the standards established by this Court in the leading cases of *Aguilar v. Texas*, 378 U.S. 108 (1964), and *Spinelli v. United States*, 393 U.S. 410 (1969), to the case at bar leaves no doubt that the search was invalid and that its fruits must be suppressed. Those standards as adopted by the Supreme Court of Ohio, in a unanimous decision, set forth a two-part test of what must be shown:

> First, the underlying circumstances which will enable the magistrate to independently judge the validity of the informant's conclusion that narcotics were on the premises; second, sufficient information to show that the informant was credible or his information reliable. *State v. Haynes*, 25 Ohio St.2d 264, 267 N.E.2d 787, 789 (1971).

The facts in the present case are not sufficient to justify the informant's conclusion that narcotics were at the residence of Petitioner and there is not sufficient evidence to show that the informant was credible or that her information was reliable. The only fact giving any weight to the informant's reliability is that she was alleged to have previously been a reliable informant. "Although the fact that the informant *has previously* supplied reliable information carries some weight, the determination of reliability or credibility cannot be based solely upon that fact." 267 N.E.2d at 790 (emphasis in original).

As the *Spinelli* case demonstrates, the importance of stating the underlying facts that support the informant's conclusion that contraband is located at the premises to be searched cannot be underestimated. In that case a search warrant was issued in connection with a gambling charge and, although the affidavit contained many more underlying facts than the affidavit in the instant case, the Court found the warrant invalid. In referring to the "underlying facts" test this Court stated:

> Perhaps even more important is the fact that *Aguilar's* other test has not been satisfied. The tip does not contain a sufficient statement of the underlying circumstances from which the informer concluded that Spinelli was running a bookmaking operation. We are not told how the FBI's source received his information—it is not alleged that the informant personally observed Spinelli at work or that he had ever placed a bet with him. Moreover, if the informant came by his information indirectly, he did not explain why his sources were reliable. Cf. *Jaben v. United States*, 381 U.S. 214, 85 S.Ct. 1365, 14 L.Ed. 2d 345 (1965). *In the*

> *absence of a statement detailing the manner in which the information was gathered, it is especially important that the tip describe the accused's criminal activity in sufficient detail* that the magistrate may know that he is relying on something more substantial than a casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation. 393 U.S. at 416 (emphasis added).

The facts in the case at bar do not detail "the manner in which the information was gathered" nor do they in any way describe "the accused's criminal activity." These points, plus the fact that the affidavit does not sufficiently state the reasons why the informant was a reliable person, require that the search warrant be declared invalid and the fruits of the search suppressed.

Applying the law to the specific facts contained in the oral testimony introduced at the hearing on the motion to suppress evidence, the Court will find several deficiencies that necessitate a finding that the present warrant is not constitutionally valid. Although the informant, Dawn Gregory, stated that at some unspecified time in the past she observed drugs in Petitioner's apartment there is no indication as to how she knew the drugs to be contraband. Although she claimed to have taken these drugs her testimony at trial indicated that she took many things without having much idea of the nature of the substances she induced into her body. But most importantly, there was no indication as to when she observed these drugs.

> While the statute does not fix the time within which proof of probable cause must be taken by the judge or commissioner, it is manifest that the

proof must be of facts so closely related to the time of the issue of the warrant as to justify a finding of probable cause *at that time*. *State v. Gennett*, 6 Ohio Misc. 176, 275 N.E.2d 275, 278 (1966), quoting *Schoeneman v. United States*, 115 U.S.App.D.C. 110, 317 F.2d 173 ( ), at 177 (emphasis added).

The only other facts given to indicate that there might have been drugs present in Petitioner's residence were that one Randy Guy gave Dawn Gregory some drugs and Randy Guy said that they came from "Julie" at "the house." Not only was Petitioner's residence a three-apartment dwelling, but the reliability of the information from the person identified as Randy Guy is so obviously insufficient to support any finding of probable cause that it needs no further discussion.

We are left, then, with only the bald allegation of Miss Gregory in response to the question, "Does he have it at the house now?" "Yes, he does." But nothing follows to support this contention and it is more than amply clear that an unsupported conclusion of this sort cannot form the basis for the issuance of a search warrant, as demonstrated by the many cases cited herein.

One question remains with respect to the additional testimony not included in the affidavit: Does it add anything to the reliability of the informant, Dawn Gregory? There are two facts from which an inference on this point may be drawn. First, the informant hid her true age, claiming she had reached the age of majority when in fact she was a juvenile (R-149,

R-151). Second, the informant was a constant and habitual drug user. Clearly, the reliability of the source of information upon which the issuance of the search warrant was justified was never established.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment of the Supreme Court of Ohio.

Respectfully submitted,

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APPENDIX A

STATUTES INVOLVED

Constitution of the State of Ohio

Article I, Section 9 Bailable offenses; of bail, fine, and punishment.

All persons shall be bailable by sufficient sureties, except for capital offenses where the proof is evident or the presumption great. Excessive bail shall not be required; nor excessive fines imposed; nor cruel and unusual punishments inflicted.

Article I, Section 14 Search warrants and general warrants.

The right of the people to be secure in their persons, houses, papers, and possessions, against unreasonable searches and seizures shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation, particularly describing the place to be searched and the person and things to be seized.

Ohio Revised Code

Section 3719.01 Definitions.

(M) "Narcotic drugs" means coca leaves, opium, isonipecaine, amidone, isoamidone, keto-bemidone, and every substance not chemically distinguished from them and every drug, other than cannabis, which may be

included in the meaning of "narcotic drug" under the federal drug abuse control laws.

Section 3719.09 Lawful possession.

(A) Except as provided in division (B) of this section, no person shall have in his possession or under his control any narcotic drug or narcotic drug preparation.

(B) This section does not apply to:

(1) Possession of narcotic drugs in the course of business by a manufacturer, wholesaler, practitioner, pharmacist, owner of a pharmacy, or other person authorized to administer, dispense, or possess narcotic drugs under sections 3719.01 to 3719.22, inclusive, of the Revised Code;

(2) Possession by any person of any narcotic drug exempted under section 3719.15 of the Revised Code, where the quantity of such drug does not exceed two grains of opium, one-half grain of morphine or any of its salts, four grains of codeine or any of its salts, two grains of dihydrocodeine, or any of its salts, or one-half grain of ethylmorphine or any of its salts, or, in the case of any other narcotic drug or any combination of narcotic drugs, where the quantity does not exceed in pharmacologic potency any one of the drugs named above in the quantity stated;

(3) Possession by any person of any narcotic drug obtained pursuant to a prescription issued by a

practitioner, which drug is in the original container in which it was dispensed to such person.

(C) Possession of a narcotic drug, except as provided in division (B) of this section, is presumptive evidence of intent to violate this section.

Section 3719.20 Prohibitions.

No person shall:

(A) Possess for sale a narcotic drug except in accordance with the provisions of sections 3719.01 to 3719.22, inclusive, of the Revised Code.

Section 3719.23 Definitions.

As used in sections 3719.23 to 3719.29, inclusive, of the Revised Code:

(A) "Barbiturate" means the salts and derivatives of barbituric acid, also known as malonyl urea, having hypnotic or somnifacient action, and compounds, preparations, and mixtures thereof.

(B) "Amphetamine" means any drug which contains any quantity of amphetamine or any of its optical isomers or any salt of amphetamine or any salt of an optical isomer of amphetamine.

Section 3719.24 Prohibition against delivery of barbiturates.

No person shall:

(A) Deliver any barbiturate or amphetamine unless:

(1) Such barbiturate or amphetamine is delivered by a pharmacist, upon an original prescription, and there is affixed to the immediate container in which such drug is delivered a label bearing all of the following matter:

(a) The name and address of the owner of the establishment from which such drug was delivered;

(b) The date on which the prescription for such drug was filled;

(c) The number of such prescription as filed in the prescription files of the pharmacist who filled such prescription;

(d) The name of the practitioner who prescribed such drug;

(e) The name and address of the patient, and if such drug was prescribed for an animal, a statement showing the species of the animal;

(f) The direction for use of the drug as contained in the prescription;

(2) Such barbiturate or amphetamine is delivered by a practitioner in the course of his practice and the immediate container in which such drug is delivered bears a label on which appears the directions for use of

such drug, and the name and address of such practitioner, the name and address of the patient, and, if such drug is prescribed for an animal, a statement showing the species of the animal.

(B) Refill any prescription for a barbiturate or amphetamine unless so designated on the prescription by the practitioner;

(C) Deliver a barbiturate or amphetamine upon prescription unless the pharmacist who filled such prescription files and retains it as required by division (B) of section 3719.26 of the Revised Code;

(D) Possess a barbiturate or amphetamine unless such person obtained such drug on the prescription of a practitioner or in accordance with division (A)(2) of this section or from a person licensed by the laws of any other state or the District of Columbia to prescribe or dispense barbiturates or amphetamines;

(E) Refuse to make available and to accord full opportunity to check any record or file as required by section 3719.27 of the Revised Code;

(F) Fail to keep records as required by division (A), (B), or (C) of section 3719.26 of the Revised Code;

(G) Use to his own advantage, or reveal other than to an officer or employee of the state board of pharmacy, or to a court when relevant in a judicial proceeding under sections 3719.23 to 3719.29, inclusive, of the Revised Code, any information required

under the authority of section 3719.27 of the Revised Code concerning any method or process which as a trade secret is entitled to protection;

(H) Obtain or attempt to obtain a barbiturate or amphetamine by fraud, deceit, misrepresentation, or subterfuge; or by the forgery or alteration of a prescription; or by the use of a false name or the giving of a false address.

Nothing in this section shall be construed to interfere with or make illegal the purchase, collection, or possession of any drug or drugs by any law enforcement official when necessary to purchase, collect, or possess such a drug or drugs in the performance of his official duties as a law enforcement officer.

Section 3719.32 Regulating the sale of poisons.

No person shall knowingly sell or deliver to any person otherwise than in the manner prescribed by law, or sell or deliver to a minor under sixteen years of age in the manner prescribed by law but without the written order of an adult, any of the following substances or any poisonous compounds, combinations, or preparations thereof: the compounds and salts of antimony, arsenic, chromium, copper, lead, mercury, and zinc; the concentrated mineral acids; oxalic and hydrocyanic acids and their salts, and carbolic acid; yellow phosphorus; the essential oils of almonds, pennyroyal, tansy, and savin, croton oil, creosote, chloroform, chloral hydrate, and cantharides; aconite,

belladonna, bitter almonds, colchicu, cotton root, cocculus indicus, conium, cannabis indica, digitalis, hyoscyamus, ignatia, lobelia, nux vomica, opium, physostigma, phytolacca, strophanthus, stramonium, veratum viride, or any of the poisonous alkaloids or alkaloidal salts or other poisonous principles derived from such alkaloids, or other poisonous alkaloids or their salts; or other virulent poison.

Section 3719.40 Hallucinogen defined.

As used in sections 3719.41 to 3719.49, inclusive, of the Revised Code, "hallucinogen" means lysergic acid diethylamide, commonly known as LSD., N-N-dimethyltryptamine, commonly known as DMT., cannabis, commonly known as marijuana, hashish, ganja, or bhang, psilocybin, mescaline, peyote, bufotenin, epena, parica, ayahuasca, yage, caapi, amanita, muscaria, and any other compound, mixture, preparation, or substance which produces hallucinations or illusions when introduced into the body.

As used in this section, "cannabis" includes all parts of the plant cannabis sativa L., whether growing or not; the seeds thereof; the resin extracted from any part of such plant; every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds, or resin; and tetrahydrocannabinol; but does not include the mature stocks of such plant; fiber produced from such stalks, oil, or cake from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stocks except the resin extracted therefrom, fiber, oil or

cake, or the sterilized seed of such plant which is incapable of germination.

Section 3719.42 License for manufacture.

No person shall, for the purpose of producing hallucinations, or illusions, or knowing an hallucinogen will be used for such purpose, manufacture, produce, cultivate, grow, prepare, sell, offer for sale, barter, give away, or dispense an hallucinogen, or knowingly permit the same to be done on land owned, occupied, or controlled by him, without first obtaining a license as a manufacturer of hallucinogens from the state board of pharmacy. The manufacture, production, cultivation, growing, preparation, selling, offering for sale, bartering, giving away, or dispensing of any hallucinogen specifically named in section 3719.40 of the Revised Code constitutes prima-facie evidence of a violation of this section.

Section 3719.43 Wholesaler's license required.

No person except a licensed pharmacist or owner of a pharmacy, or a manufacturer licensed under section 3719.42 of the Revised Code shall possess for sale, or sell, barter, exchange, dispense, give away, or make offer therefor, any hallucinogen without obtaining a license as a wholesaler of hallucinogens from the state board of pharmacy.

Section 3719.44 Prohibitions.

No person shall:

(B) Possess for sale any hallucinogen except in accordance with sections 3719.40 to 3719.49, inclusive, of the Revised Code, or conspire with another person or persons to violate section 3719.43, division (C) or (E) of section 3719.44, or section 3719.47 of the Revised Code.

Section 3719.99 Penalties.

(C) Whoever violates section 3719.09, or 3719.101 [3719.10.1], division (I), (J), or (K) of Section 3719.20, section 3719.42, division (A) of section 3719.44, or section 3719.47 of the Revised Code shall be fined not more than ten thousand dollars and imprisoned not less than two nor more than fifteen years for a first offense; for a second offense such person shall be fined not more than ten thousand dollars and imprisoned not less than five nor more than twenty years; for a third offense and each subsequent offense thereafter such person shall be fined not more than ten thousand dollars and imprisoned not less than ten nor more than thirty years.

(D) Whoever violates division (A) or (H) of section 3719.20 or division (B) of section 3719.44 of the Revised Code shall be imprisoned not less than ten nor more than twenty years for a first offense; for a second offense such person shall be imprisoned not less than fifteen nor more than thirty years; for a third offense such person shall be imprisoned not less than twenty nor more than forty years.

(I) Whoever violates division (D) of section 3719.24 of the Revised Code shall be fined not more than one

thousand dollars or imprisoned not more than one year, or both, for a first offense; for each subsequent offense such person shall be fined not more than one thousand dollars or imprisoned not more than ten years, or both.

(M) Whoever violates section 3719.32 or 3719.33 of the Revised Code shall be fined not less than ten nor more than fifty dollars.

Section 4729.28 Unlawful selling of drugs.

No person who is not a registered pharmacist or a registered assistant pharmacist and who is employed in a retail drug store, under the management or control of a registered pharmacist, shall compound, dispense, or sell a drug, chemical, poison, or pharmaceutical preparation.

Section 4729.51 Persons who may sell, purchase, distribute, or deliver dangerous drugs.

(C) No person, except a licensed terminal distributor of dangerous drugs or a practitioner shall purchase for the purpose of resale, possess for sale, or sell, at retail, dangerous drugs.

The possession by any person, other than a practitioner, registered wholesale distributor of dangerous drugs, or licensed terminal distributor of dangerous drugs except those drugs obtained lawfully for medical purposes from or upon the prescription of a practitioner shall constitute presumptive evidence that such person is in violation of this division, provided,

that a person may lawfully possess or use dangerous drugs pursuant to section 4729.51 of the Revised Code or otherwise as specifically provided by law.

Section 4729.99 Penalties.

(F) Whoever violates section 4729.281 [4729.28.1], division (C) of section 4729.51 or section 4729.61 of the Revised Code shall be fined not more than one thousand dollars, or imprisoned not more than one year, or both, for a first offense; for each subsequent offense such person shall be fined not more than one thousand dollars and imprisoned not less than one nor more than ten years.

APPENDIX B

STATE OF OHIO, COLUMBIANA COUNTY
IN THE COURT OF APPEALS
SEVENTH DISTRICT

STATE OF OHIO,)

PLAINTIFF-APPELLEE,)

OPINION

-vs-)

Case No. 982.

DANIEL A. DELP, JR.,)

DEFENDANT-APPELLANT.)

APPEARANCES.

Joseph J. Baronzzi, Prosecuting Attorney, Lisbon, Ohio, for Plaintiff-Appellee.

William T. Whitaker and Lawrence R. Smith of Allison & Miller, Akron, Ohio, for Defendant-Appellant.

Hon. John J. Lynch,
Hon. Joseph E. O'Neill, JJ., and
Hon. Nils P. Johnson, J.,
Retired, Assigned to active duty
under authority of Section 6 (C),
Article IV, Constitution.

Dated: June 26, 1974.

Grace Marten,
Court of Appeals Reporter,
Mahoning County Courthouse,
Youngstown, Ohio.

O'NEILL, J.

The first assignment of error contends that the trial court prejudicially erred in not sustaining defendant's motion to suppress evidence secured by use of a search warrant. On November 3, 1972, an affidavit for a search warrant was executed and presented to the Hon. Warren Bettis, Judge. The affiant deposed that his belief was based upon personal knowledge of another person, Dawn Gregory. There was no recitation of the mode by which Dawn Gregory had gained this "personal knowledge". At this point, we are constrained to hold that a recitation as appeared in this affidavit, in and of itself, would not give an issuing magistrate probable cause to issue a search warrant. Apparently Judge Bettis reached the same conclusion because he did not forthwith issue the requested warrant. Judge Bettis heard further testimony from the affiant and, from the informant, Dawn Gregory, before he issued the warrant. This fact was developed at a hearing on the motion to suppress.

Judge Bettis appeared as a witness. Judge Bettis testified that he heard testimony from the two witnesses, – one policeman and one young lady. Judge Bettis also identified a typewritten transcript of his hearing as being correct (S. X. 1). Judge Bettis testified that he issued the warrant in reliance on the affidavit and the fact that Dawn Gregory testified that "she

personally observed the drugs and participated in the use of them, at Mr. Delp's house" (R. 16).

However, appellant says that such additional testimony could not cure the defective affidavit. He says that the affidavit must stand on its own. We could agree with him in instances where the warrant was issued upon the basis of the affidavit, alone. In those cases, the only test of the magistrate's finding of probable cause would be the affidavit. A finding of probable cause to believe is his duty and to bind him strictly to the affidavit would be a frustration of his discretion and, almost place him between a hard place and a rock. It is unreasonable to say that his determination should be based upon one singular affidavit and, this singularity is not required.

> "A search warrant issued for a private dwelling must be based on a neutral magistrate's determination from sworn *statements* of probable cause to believe there is criminal activity on the premises." United States v. Markan, 356 F. Supp. 742, page 745. (Emphasis added).

The consideration of further testimony has been recognized and recommended.

> "Furthermore, the magistrate should demand more facts if necessary, should set forth a record of facts recited under oath in addition to the affidavit and should enter his findings of fact on a docket sheet, thus making available a record for any reviewing tribunal testing the validity of the warrant." United States v. Markan, 356 F. Supp. 742, page 747.

The Markan case originated when a search warrant was issued by a Judge of the Cleveland Municipal

Court. There is what appears to be conflicting reported *authority out of the Cleveland Municipal Court.*

> "4. Affidavit supporting search warrant must be self-sufficient in matter of probable cause and cannot be bolstered by oral testimony." City of Cleveland Heights v. Spellman, 213 N. E. 2d 206, syllabus 4.

The Spellman case is cited and urged by appellant. In that case, there was a faulty affidavit, but the prosecution argued that in addition to the affidavit, the affiant orally informed the issuing Judge of further evidence. Apparently this oral information was not under oath, was not recorded, nor was the issuing judge called as a witness at the hearing on the motion to suppress. The Spellman Court cited as authority for its fourth syllabus the case of Dumbra v. United States, 268 U.S. 435. The Dumbra case dealt with a warrant issued upon an affidavit, only. There was no mention of other testimony. That Court said:–

> "We are concerned only with the question whether the affiant had reasonable grounds at the time of his affidavit and the issuance of the warrant for the belief that the law was being violated on the premises to be searched; * * *." (Page 441).

"Reasonable grounds" is not only a test for the reviewing court; it is also a determination to be made by the issuing magistrate. Common sense dictates that all policemen are not editors, authors, English teachers nor, lawyers. Very potentially a policeman might be possessed of the requisite knowledge to secure a warrant, but does not properly express such knowledge. If such shortcoming is obvious it would be inane to hold that a magistrate should refuse to inquire. His

inquiry should be limited to the facts skeletally related in the affidavit and should be conducted with administered oaths. It is not for the magistrate to supply missing information, but only to enlarge the information set forth in the affidavit so that he may fairly arrive at his determination. We cannot pass this question without recognition of appellant's reliance upon City of Cleveland Heights v. Spellman, 213 N. E. 2d 206, and Poldo v. United States, 55 F. 2d 866. The Poldo case, in the Ninth Federal Circuit, has been repeatedly cited as authority in that Court, as recent as March 21, 1972.

> "As long ago as 1932, we held that a search warrant which was defective . . . could not be cured by oral testimony dehors the affidavit." United States v. Anderson, 453 F. 2d 174, 176. (Dec. 20, 1971).

> " 'All data necessary to show probable cause for the issuance of a search warrant must be contained within the four corners of a written affidavit given under oath . . .' United States v. Anderson (9th Cir. 1971) 453 F. 2d 174, 175." United States v. Bailey, 458 F. 2d 408, page 412 (March 21, 1972).

It has also received authoritative recognition in other Federal Circuits and Districts. However, we do not agree with this strict rule and, we do not feel that the U.S. Supreme Court agrees. In passing upon the case of Aguilar v. Texas, 378 U.S. 108, the United States Supreme Court made a passing reference to the idea of "further information" at page 109:–

> "'The record does not reveal, nor is it claimed, that any other information was brought to the attention of the Justice of the Peace. It is

elementary that in passing on the validity of a warrant, the reviewing court may consider only information brought to the magistrate's attention."

The United States Supreme Court reiterated its reference to other information in Whiteley v. Warden, 401 U.S. 560, Footnote #8, page 565:–

"Under the cases of this Court, an otherwise insufficient affidavit cannot be rehabilitated by testimony concerning information possessed by the affiant when he sought the warrant but not disclosed to the issuing magistrate."

Assignment of error No. 1-A is overruled.

The appellant argues, also, that even if the additional testimony is to be accepted, it did not present sufficient facts for the Judge to determine probable cause at the time of issuance of the warrant. In determining probable cause for the issuance of a warrant, the magistrate is not restricted to a prima facie showing of criminal activity; however, he must find evidence more stringent than suspicion or belief.

"...,this Court has long held that 'the term "probable cause"... means less than evidence which would justify condemantion,'... and that a finding of 'probable cause' may rest upon evidence which is not legally competent in a criminal trial." United States v. Ventresca, 380 U.S. 102, page 107.

The appellant argues that there was nothing presented whereby to show that the informant was credible or reliable. Reliability of a "tip" by an informant can be established.

"In the absence of a statement detailing the manner in which the information was gathered, it

is especially important that the tip described the accused's criminal activity in sufficient detail that the magistrate may know that he is relying on something more substantial than a casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation." Spinelli v. United States, 393 U.S. 410, page 416 and State v. Haynes, 25 Ohio St. 2d 264, page 267.

In the instant case, the informant stated, under oath, that she had been in the residence to be searched; had seen "grass, and THD, acid and that"; had taken them herself; had taken "them" two days before and had a 12 hour "bad trip". This recitation was detailed, it did not bespeak gossip. It was a personal observation and experience. It was a description of criminal activity in detail. It gave reason to believe that it was reliable and that she had seen these drugs in the appellant's house, sometime. It is this "sometime" that causes a weakness in the issuance of the warrant. The affidavit furnishes no reliable information which might lead one to reliably believe that at the time of its execution, there was criminal activity afoot in appellant's residence. During the additional testimony, the informant testified that everytime you went in the house, there was stuff laying everywhere, she was not asked and did not say when she was last in the house. She said that two days before the affidavit date, Randy Guy got some T H C from the house. She did not explain any circumstances as to how she knew Randy Guy got it from appellant's house. In fact, Randy Guy apparently passed the T H C to some one named Julie, who gave it to the informant. The decision was up to the issuing magistrate and, though weak in some details, considered totally he was

justified in determining probable cause to believe that criminal activity was being carried on in the house.

In the original two count indictment, the appellant was charged with possession for sale of "an hallucinogen, to-wit: LSD, P.C.P. and Marijuana, not in accordance with Sections 3719.40 and 3719.49, inclusive".

LSD and Marijuana are defined by law (R.C. 3719.40) as being hallucinogens.

The appellant filed a motion for bill of particulars requesting, amongst other things:–

> "10. State the chemical properties of P.C.P. and its chemical components;
>
> "12. State whether the alleged P.C.P. is known by another generic name;"

The State answered (2-13-73):–

> "Phencyclidine hydrochloride (1-phenyl-1-piperidinocyclo-hexane hydrochloride), and is sold as Sernylan or Sernyl as a veterinary prescription drug for use as an anesthetic and analgesic on animals."

Following this reply, the appellant moved to strike the term P.C.P. from count one of the indictment. His brief argued that "there is nothing in Plaintiff's Bill of Particulars that indicates any hallucinogenic substance". The trial court overruled this motion. Whether P.C.P. is or is not "a substance which produces hallucinations" then became a matter of proof during trial. The overruling of the motion to strike was proper. There was nothing, positive, in the State's Bill of Particulars, other than chemical make-up and terms. This is all that was asked. There was nothing in appellant's brief whereby the trial judge could definitely conclude that P.C.P. was *not* a substance which could cause hallucinations.

During trial, the State presented a witness, Dombrowski, in an attempt to prove that P.C.P. was a substance which could produce hallucinations. We reviewed his testimony, and find that he presented no probative evidence which the jury could ponder. In fact, the witness admitted that he, as a chemist, did not know what effect P.C.P. produced (R. 242). He said that he could not positively say that P.C.P. would cause hallucinations (R. 242). At the close of the State's case, appellant moved to strike the term P.C.P. from the indictment. The trial court should have sustained this motion, but did not, but such error was not prejudicial.

The appellant filed in the trial court a motion requesting the Court to order the State "*to give a copy of all statements taken of any witnesses expected to testify and all reports indicating what any of the State's witnesses' testimony will be*". The appellant also moved the Court "*to order the State to give the names and addresses of any witnesses expected to testify and any prior criminal record of said witnesses.*" (1-18-73). (Emphasis added). On February 13, 1973, the Court overruled this motion, and made the following entry:–

> "The Court has been advised by the professional statement of the Prosecuting Attorney that he has no statements of the defendant, or of any witness, which would exculpate the defendant, from the crime with which he is charged; and, on said basis, the motion for names, addresses, and prior records of witnesses is overruled."

The prosecuting attorney affirmed that he had no statements, he presented no statements at trial. Accordingly, the Court did not err in denying this portion of the motion.

The appellant contends that he had also requested discovery "specifically as to similar acts". We do not find such a specific request in the motion. There was a general request that he be furnished "*all reports indicating what any of the State's witnesses' testimony will be*". Apparently, appellant had reasoned that the State to prove its case of possession for sale would introduce evidence of previous sales or acts (R. 341). This is a proper presentation by the prosecution.

> "If such 'other acts' tend to show the defendant's scheme, plan or system in such a way as to constitute substantial probative evidence that the accused did an act or acts involved in the crime charged, such evidence is to be received without limitation." State v. Flonnory, 31 Ohio St. 2d 23 124, 128.

There is no fixed rule with respect to disclosre [sic] of witnesses, especially informers.

> "The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense." Roviaro v. United States, 353 U.S. 53, page 62.

In the instant case, the informer was known. It was upon her information that the search warrant was issued. At the hearing on this motion, appellant intimated that she would probably be called to establish other acts (R. 33-34). Dawn Gregory did so testify. There was no indication nor presumption prior to trial that she might exculpate the appellant. The appellant has failed to show that he was surprised by the testimony of Dawn Gregory nor has he shown any inconsistencies between her in-court testimony and her

testimony before Judge Bettis at the search warrant hearing.

"Mr. Smith: Would your Honor grant a hearing on the issue–. . .

"The Court: Well, I'm going to try to follow the statutes and the law on it, and if you want to make some law in the Supreme Court of Ohio, or the United States, you can do it.

"Mr. Smith: Then, you would be open to testimony?

"The Court: Yes." (R. 45).

The appellant did not pursue an evidentiary hearing even though the trial court had said he would be "open to testimony". Assignment of error No. 4 is overruled.

The appellant was indicted on the first count for a violation of Sections 3719.40 to 3719.49, and on the second count for violation of R.C. 3719.01 to 3719.22.

Appellant filed a motion requesting the Court "*to order the Prosecutor to elect to prosecute the defendant as to the first count under O.R.C. Sections 3719.43, 3719.42 and 4729.28, and as to the second count under O.R.C. Section 4729.28.*" (Emphasis added).

R.C. Section 3719.42 provides that no person "shall manufacture, produce, cultivate, grow, prepare, sell, offer for sale, barter, give away, or dispense an hallucinogen" unless he is licensed by the state board of pharmacy. The penalty for violation, first offense, is prescribed as a fine not more than $10,000.00 and imprisonment not less than two nor more than fifteen years.

R.C. Section 3719.43 provides that no person except a licensed pharmacist or owner of a pharmacy, or

manufacturer may traffic in hallucinogens unless licensed as a wholesaler, thereof, by the state board of pharmacy. A violation of this statute is punishable by a fine of not more than $500.00 or imprisonment of not less than one nor more than five years for a first sentence.

Section 4729.28 provides:—

"No person who is not a registered pharmacist or a pharmacy intern under the personal supervision of a registered pharmacist shall compound, dispense, or sell drugs, dangerous drugs, and poisons."

A first violation of R.C. 4729.28 is punishable by a fine of not less than one hundred nor more than three hundred dollars.

The appellant was indicted for violation of R.C. 3719.44(B) which provides that no person shall possess for sale any hallucinogen except in accordance with regulatory statute. A violation, thereof, is punishable by imprisonment of not less than ten nor more than twenty years for a first offense.

Factually, the defendant could have been charged under any of these four statutes and the penalty would range from a moderate fine to lengthy imprisonment.

The appellant argued below and, argues here that this disparity of punishment and, the matter of choice vested in the prosecutor is unconstitutional for the reason that it denies him his guaranty of equal protection of the laws.

At the motion hearing, the prosecutor agreed that he probably could have proceeded under other statutes but based upon the evidence "I elected to charge him, as it was charged" (R. 44).

Under the equal protection clause no person may be subjected to a greater or different punishment for an offense than that to which others of the same class are subjected. This guaranty, however, does not affect the right of a state to punish one offense more severely than another. This amounts to constitutional classification. As long as classification has a real and substantial basis, it is not unlawful.

> "The ultimate question in any classification problem is whether it has some reasonable basis, not whether some were excluded from such class who might well have been included thereon.
>
> "So long as classifications have a real and substantial basis they cannot be said to be violative of the equal protection clause even though the lines drawn therein are very narrow." State, ex rel. Burton, Pros. Atty. v. Greater Portsmouth Growth Corp., 7 Ohio St. 2d 34, at page 37.

We find a distinct and substantial difference between R.C. 3719.42 and 3719.44(B). Section 3719.42 applies to a person who, among other things, sells or offers for sale a hallucinogen "*for the purpose of producing hallucinations, or illusions, or knowing an hallucinogen will be used for such purpose*". Section 3719.44(B) is different in that it does not require a sale nor an offer for sale, it requires only "possess for sale"; *nor does it require proof of intent of "producing hallucinations, or illusions, or knowing an hallucinogen will be used for such purpose*".

A reading of R.C. 3719.43 manifests that the crime provided thereby is specifically the possession for sale of "any hallucinogen" without being licensed by the state board of pharmacy. This is obviously a policing statute

covering those who legally possess but in the absence of punishment might not secure the proper permits.

Section 4729.28 applies to a person who *sells* a drug. This is a variance from possession for sale and thus, a different crime. The difference is well explained in State v. Conley, 32 Ohio App. 2d 54, at page 63:–

> "The gist of the crime (Sections 3719.42, 3719.43 and 4729.28) is not being a licensed pharmacist. Here, (3719.44) the gist of the crime is the (possession for sale) *selling of a certain type of drug which is forbidden to be sold by anyone*, but with certain exceptions being permitted where a legitimate use of the drug may be involved." (Emphasis added).

Thus, we are not dealing with the same acts. The legislature adopted different acts, different crimes. The actions of the legislature are constitutional. Assignment of error number 5 is overruled.

At some point between the jury verdict and imposition of sentence, the appellant requested an evidentiary hearing to show that the sentence to be imposed was cruel and unjust. This motion was denied by the Court, and such denial is here raised as assignment of error number 6. There was no proffer into the record of the evidence that would have been presented, had a hearing been granted. Upon argument to this Court, appellant claims that the drugs involved are harmless. However, by his own brief he admits that the alleged harmlessness is "relative", he says that there is a "growing consensus" that the "use of these drugs is not the danger it was once perceived to be". This does not convince us that we are dealing with a non-serious crime. It is only two years ago that the Ohio Supreme

Court found that a "20-to-40 year sentence imposed (for selling Cannabis Sativa) does not constitute cruel or unusual punishment". (State v. Chaffin, 30 Ohio St.2d 13, page 17). Furthermore, the sentence imposed (R. C. 3719.99) was before the Ohio Legislature within the last two years, they saw fit not to change it. This Court has expressed itself as being of the opinion that this issue "is within the realm of legislative policy". State v. Kramel, Portage County Court of Appeals Case No. 363. Assignment of error No. 6 is overruled.

The seventh assignment of error contends that in the trial, there was not produced the requisite proof that appellant possessed the narcotic and hallucinogenic substances for the purpose and intent to sell.

> "To convict one of *possession* for sale, the state must prove that the accused had (1) actual possession or control of the substance, (2) that the accused knew that the narcotic substances were in his possession, (3) that he knew the substances were narcotics, and (4) that at the time he possessed said narcotic substance, he did so for the purpose and with the intent to sell that narcotic substance." (Emphasis added). State v. Haynes, 25 Ohio St. 2d 264, page 269.
>
> R.C. 3719.01(H) defines "Sale" as follows:–
>
> "(H) 'Sale' includes barter, exchange, or gift, or offer therefor, and each such transaction made by any person, . . ."

We find from a review of the testimony of the chief prosecuting witness that the appellant, beyond a reasonable doubt, was involved in the "sale" of marijuana and upon the date of his arrest was in possession for that purpose. There is also uncontroverted evidence that he had possession of cocaine in

a small aluminum foil packet (R. 25) in the form of white powder (R. 213 and Exhibit No. 1). However, we find no evidence to indicate that at the time appellant possessed the cocaine, he did so for the purpose and with the intent to sell it. The trial court did instruct the jury that upon the second count (cocaine) they could consider the lesser included offense of mere possession (R. 448). Upon the evidence, this is the verdict which should have been returned.

Accordingly, that portion of the final judgment, wherein on the second count the defendant was sentenced to be imprisoned in the Ohio State Penitentiary for a period of not less than ten nor more than twenty years, is vacated and modified to read that the defendant on the second count being guilty of the lesser included offense of possession is to be imprisoned in the Ohio State Penitentiary for a period of not less than two nor more than fifteen years. The remainder of the final judgment is affirmed.

Judgment on second count modified to imprisonment in Ohio State Penitentiary for a period of not less than two nor more than fifteen years and remainder of final judgment affirmed.

Lynch, P.J., Concurs.

Johnson, J., Retired, Concurs.
assigned to active duty under
authority of Section 6(C),
ARTICLE IV, Constitution.

APPROVED:

/s/ Joseph E. O'Neill
JUDGE.

APPENDIX C

THE SUPREME COURT OF OHIO

THE STATE OF OHIO,	)	1974 TERM
CITY OF COLUMBUS.	)	To wit: November 15, 1974
State of Ohio,	)	
Appellee,	)	No. 74-803
vs.	)	APPEAL FROM THE COURT OF APPEALS
Daniel A. Delp, Jr.,	)	FOR COLUMBIANA COUNTY
Appellant.	)	

This cause, here on appeal as of right from the Court of Appeals for COLUMBIANA County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

THE SUPREME COURT OF OHIO

THE STATE OF OHIO,	)	1974 TERM
CITY OF COLUMBUS.	)	To wit: November 15, 1974
State of Ohio,	)	
Appellee.	)	No. 74-803
vs.	)	MOTION FOR LEAVE TO APPEAL
Daniel A. Delp, Jr.,	)	FROM THE COURT OF APPEALS FOR COLUMBIANA COUNTY
Appellant.	)	

It is ordered by the Court that this motion is overruled.